

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 15
TEH

09/29/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **International Cosmetics Manufacturer, Inc.**

Serial No. 75/350,146

Herbert Dubno of Karl F. Ross P.C. for International Cosmetics Manufacturer, Inc.

J. Matthew Gowdy, Trademark Examining Attorney, Law Office 110
(Chris A.F. Pedersen, Managing Attorney)

Before Seeherman, Hanak and Holtzman, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

International Cosmetics Manufacturer, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register the mark shown below for goods which were subsequently amended to read, "cosmetics, namely, nail polish, nail polish remover, eye liner, mascara, eye shadow, lip pencil, lip liner, lipstick, face powder, face makeup and blush."¹

¹ Application Serial No. 75/350,146, filed September 2, 1997, alleging dates of first use on August 26, 1997.



The Trademark Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the following registered mark for "cologne, body lotion, shower gel" as to be likely to cause confusion."²

Té

When the refusal was made final, applicant appealed. Briefs have been filed, but an oral hearing was not requested.³

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or

² Registration No. 2,127,210; issued January 6, 1998.

³ The application was assigned to a different Examining Attorney for the appeal brief.

services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976) and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Turning first to the goods, the Examining Attorney argues that applicant's cosmetics products and registrant's cologne, body lotion and shower gel are all related, pointing out that the products are marketed together and are often sold by the same source. In support thereof, the Examining Attorney has made of record copies of thirty third-party registrations covering both types of goods under the same marks. The Examining Attorney maintains that although consumers "might take care in choosing makeup for their faces" they are not "sophisticated or knowledgeable in the field of trademarks" or immune from source confusion.

Applicant, on the other hand, argues that its own goods are "not the same" as those of registrant, that cosmetic products "remain visible in use" whereas those in the registration "are recognizable by smell" and are not visible once they have been applied. Applicant also contends that the respective products, and particularly the cosmetics, are purchased by "a very discerning public" and selected "with a measure of significant care." Applicant maintains that the third-party registrations are not "evidence of a likelihood of confusion in the marketplace" because the registrations fail to take into account

situations where there is a difference in the marks and the care used in purchasing the goods.

It is true that there are specific differences in the respective products. They do not have identical properties and they are not interchangeable. However, the question is not whether purchasers can differentiate the goods themselves but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the goods of the applicant and registrant be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

We find that applicant's cosmetic products on the one hand, and registrant's cologne, body lotion and shower gel on the other are all related products. Notwithstanding the different product characteristics, they all constitute preparations which are typically used as part of an everyday beauty or personal grooming regimen to enhance physical appeal, and they would all be sold in

the same channels of trade to the same classes of customers. Moreover, the thirty third-party registrations show, in each instance, a mark which is registered for both cosmetic products and one or more of registrant's products. Although the third-party registrations are not evidence of use of the marks in commerce, the registrations have probative value to the extent that they suggest that the identified goods are of a type which may emanate from a single source.⁴ See, e.g., *In re Albert Trostel & Sons Co.*, supra at 1785-1786; and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). It is clear that consumers would be likely to believe that cosmetic products, and cologne, body lotion and shower gel, if sold under similar marks, emanate from or are sponsored by the same source if such goods are sold under the same or similar marks.

Moreover, all of these items are relatively inexpensive and therefore are likely to be purchased casually and on impulse, thus increasing the risk of confusion. *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146, 227 USPQ 541, 542 (Fed. Cir. 1985). Applicant's argument that the identified products, and in particular its own products, are purchased by a "discerning" public is unsupported by the record. In reality, both applicant's cosmetics and registrant's cologne, body lotion

⁴ We note that only three of these registrations involve house marks for broad or diverse categories of goods.

and shower gel would be purchased by customers of all types including members of the general public. While some of these consumers may care about the products they are purchasing or exercise a certain degree of care in selecting these products, they are not necessarily sophisticated purchasers or likely to exercise a high degree of care in terms of examining the trademarks.

Thus, we turn our attention to the marks. The Examining Attorney argues in this regard that the marks could be pronounced the same, that they contain similar visual elements, and that they create similar commercial impressions. The Examining Attorney points out that registrant's mark is the Spanish word for "tea," an arbitrary word in relation to the respective goods, and maintains that applicant's mark suggests the English word "tea."

Applicant argues that the overall appearance of the marks is "vastly different" and is particularly distinguished by the vertical versus horizontal presentation of the marks, the fonts of the marks, the number of letters in the marks, and the location and orientation of the accents in each mark. Applicant argues that its mark is neither an English nor foreign word in view of the appearance of the accent mark and applicant maintains that because the marks are "unusual," the consumer would note even the slightest differences in the marks.

The respective marks are similar in meaning, and create similar commercial impressions. Under the doctrine of "foreign equivalents" foreign words from common languages are translated into English in order to determine their confusing similarity to English word marks. In re Ithaca Industries, Inc., 230 USPQ 702 (TTAB 1986). In this case, applicant does not dispute that the term TÉ in registrant's mark is the Spanish word for "tea." Applicant instead argues that its own mark, which includes an accent over the letter "E," has no meaning in any language. For that very reason, however, purchasers would attach no strong significance to the accent in applicant's mark. There is no evidence that applicant's mark would be perceived by the average purchaser as anything other than the dictionary word "tea." The accent may perhaps lend a certain European flair to the mark, but it does not significantly affect the commercial impression of the mark or the English language meaning the mark conveys, particularly since the word "tea" with an accent mark has no known meaning in any other language.⁵

⁵ Applicant, in its initial brief, admitted that its mark suggests the word "tea" stating "[o]f course it does have some suggestiveness not only of the English word "tea" but also of the registered mark which is its Spanish equivalent...." Applicant later changed its position in its reply brief to claim that "there is no basis for the Examining Attorney's statement that Applicant's mark would suggest to the ordinary skilled consumer a beverage when applied in the form shown in the application on Applicant's goods."

There is also no dispute that "tea" is a unique and arbitrary term in relation to the products offered under the respective marks. Contrary to applicant's contention, however, this is a factor which not only broadens the scope of the registered mark's protection, but increases the likelihood that the marks, when used in connection with the identified products would be confused. See *Jockey International Inc. v. Butler*, 3 USPQ2d 1607 (TTAB 1987).

The marks are also visually similar. While there is an additional letter in applicant's mark, both marks are short, one-syllable words beginning with the letters "TE" and both marks contain an accent mark over the second letter "E." Applicant strains to differentiate the marks based on the position of the accents over the letters in each mark as follows:

...the location and orientation of the accent practically at the junction between the first and second letters and at the junction between the vertical shaft of the first letter and the convex top of the second contributes a dominant feature in [applicant's] mark...

To the extent that there are any differences in the "orientation" of the accents, such differences are so slight as to be perceptually meaningless and would hardly be recognized by the purchasing public. In fact, the presence of the accent, if anything, enhances the resemblance of the cited mark to applicant's mark. Both marks are also displayed in a similar

stylized typeface, with the first upper-case letter "T" in each mark followed by letters in lower-case form. Moreover, consumers of applicant's products would attribute a commercial, rather than any source-identifying significance, to the vertical display of applicant's mark. The thin or narrow shape of products such as eyeliner, lip pencil, lip liner and mascara dictates the placement of the mark on those products, making it practical to display the mark in a vertical manner along the goods so that the entire mark might be visible to the consumer without having to shift or turn the product.

The point is that while there are some visual differences in the marks, these differences are not likely to be recalled by purchasers seeing the marks at separate times. Under actual marketing conditions, consumers do not necessarily have the opportunity to make side-by-side comparisons between marks. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980). Thus, one who is familiar with applicant's mark TÉA, upon seeing registrant's mark TÉ, the Spanish word for "tea," is likely to remember the marks as being the same.

Finally, the marks are similar in sound, whether the marks are properly pronounced or not, and whether purchasers are familiar with the Spanish language or not. Those purchasers who are knowledgeable in Spanish may be inclined, because of the accent in applicant's mark, to pronounce applicant's mark TÉA in

the same manner as the Spanish word "TÉ." Those who are not familiar with Spanish may be likely to ignore the accents altogether and pronounce both marks as the English word "tea."

We conclude from the foregoing that consumers familiar with registrant's perfumes and body lotions sold under its mark TÉ would be likely to believe upon encountering applicant's mark TÉA for cosmetic products, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.

E. J. Seeherman

E. W. Hanak

T. E. Holtzman
Administrative Trademark
Judges, Trademark Trial
and Appeal Board